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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 BILLY DRIVER,

12 Petitioner,

13 v.

14 MICHAEL E. DELLOSTRITTO, Judge,

15 Respondent.
16

No. 1:19-cv-01772-SKO (HC)

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE**

**FINDINGS AND RECOMMENDATION
TO SUMMARILY DISMISS PETITION**

[THIRTY DAY OBJECTION DEADLINE]

17 Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for
18 writ of habeas corpus pursuant to 28 U.S.C. §2254. He filed the instant petition on December 19,
19 2019. The petition does not challenge the underlying conviction; it instead presents various
20 claims concerning the conditions of his confinement. Accordingly, the Court will recommend that
21 it be DISMISSED.

22 **DISCUSSION**

23 A. Preliminary Review of Petition

24 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
25 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
26 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
27 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
28 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to

1 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.
2 2001).

3 B. Civil Rights Claims

4 Petitioner does not challenge his conviction. He instead contends that the State is
5 obstructing him in his attempts to exhaust his administrative appeals. (Doc. 1 at 5.) He claims
6 that he has submitted over one hundred CDCR-602 appeals which have been unlawfully rejected
7 or screened out. (Doc. 1 at 5.) He claims that he is in imminent danger of more physical harm
8 due to the State's rejections of his complaints. (Doc. 1 at 6-7.)

9 A habeas corpus petition is the correct method for a prisoner to challenge the "legality or
10 duration" of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (quoting Preiser
11 v. Rodriguez, 411 U.S. 475, 485 (1973)). In contrast, a civil rights action pursuant to 42 U.S.C. §
12 1983 is the proper method for a prisoner to challenge the conditions of confinement. McCarthy v.
13 Bronson, 500 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499. Petitioner's civil rights claims
14 are not cognizable in a federal habeas action and must be dismissed. Petitioner must seek relief
15 for his complaints by way of a civil rights action.

16 In Nettles v. Grounds, 830 F.3d 922, 936 (9th Cir. 2016), the Ninth Circuit held that a
17 district court has the discretion to construe a habeas petition as a civil rights action under § 1983.
18 However, recharacterization is appropriate only if it is "amenable to conversion on its face,
19 meaning that it names the correct defendants and seeks the correct relief," and only after the
20 petitioner is warned of the consequences of conversion and is provided an opportunity to
21 withdraw or amend the petition. Id. Here, the Court does not find recharacterization to be
22 appropriate. Petitioner does not name the proper defendants and the claims are not amenable to
23 conversion on their face. Accordingly, the Court should not exercise its discretion to
24 recharacterize the action.

25 Therefore, the Court will recommend that the action be dismissed and the Clerk of Court
26 be directed to send Petitioner a blank civil rights complaint.

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1 **ORDER**

2 IT IS HEREBY ORDERED that the Clerk of Court is DIRECTED to assign a District
3 Judge to the case.

4 **RECOMMENDATION**

5 For the foregoing reasons, the Court HEREBY RECOMMENDS that the habeas corpus
6 petition be DISMISSED and the Clerk of Court be DIRECTED to provide Petitioner with a blank
7 civil rights complaint form.

8 This Findings and Recommendation is submitted to the United States District Court Judge
9 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304
10 of the Local Rules of Practice for the United States District Court, Eastern District of California.
11 Within thirty (30) days after being served with a copy, Petitioner may file written objections with
12 the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
13 Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28
14 U.S.C. § 636 (b)(1)(C). Failure to file objections within the specified time may waive the right to
15 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 IT IS SO ORDERED.

17 Dated: December 23, 2019

18 /s/ Sheila K. Olerto
19 UNITED STATES MAGISTRATE JUDGE
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